

STRIKEOUT COUNCIL POLICY

OLD LANGUAGE: ~~Struck Out~~

NEW LANGUAGE: Redline

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

SUBJECT: HEARING PROCEDURES FOR PROTESTS OF CONTRACT
SELECTION OR NON-RESPONSIBILITY DESIGNATION

POLICY NO.: 000-29

EFFECTIVE DATE: ~~July 30, 2002~~ July 16, 2004

BACKGROUND:

[No change in text.]

PURPOSE:

[No change in text.]

DEFINITIONS:

Announcement – means the declaration of the intent to *award a contract or a public works contract*, by any means of transmission, including U.S. mailing, automated phone message or Internet posting. The effective date of an *announcement* by mail is the date that the *announcement* is deposited in the U.S. mail.

Award – Contract for Goods [No change in text.]

Contract for Services - means an agreement between the City and another party in which the City is the purchaser of *services*, excluding *consultant services*. ~~Maintenance contracts are~~ *Contracts for Services* includes maintenance contracts.

Evaluation Team - Interested Parties [No change in text.]

Non-Responsible - means a determination by the City that a ~~B~~*bidder* does not have the quality, fitness, and capacity to satisfactorily perform the work proposed in a ~~Public Works Contract~~ *contract*.

Person – [No change in text.]

Protest Body – means a panel appointed by the *City Manager* as needed to review evidence presented by all *interested parties* to determine whether the *evaluation team's contract* selection is in accordance with all applicable laws and guidelines.

~~Protest Hearing Board (Board)~~ – means a panel appointed by the City Manager as needed to review evidence presented by all Interested Parties to determine whether the Evaluation Team’s Contract Selection is in accordance with all applicable laws and guidelines.

Public Works Contract - Purchasing Contract [No change in text.]

Requests for Bids (RFB) - means a City document that is advertised in the official City newspaper when required by law that contains *contract* provisions, specifications and procedures, and that invites bids proposals.

Requests for Proposals (RFP) - means the City document that is advertised in the official City newspaper when required by law that contains *contract* provisions, specifications and procedures, and that invites proposals.

Responsible – means a determination by the City that a bidder has the quality, fitness, and capacity to satisfactorily perform the work proposed in a contract.

Responsiveness – means a bidder’s compliance with the bidding instructions.

Services – [no change in text.]

POLICY:

[No change in text.]

POLICY APPLICABILITY:

This policy applies to all ~~Contracts~~ contracts procured by RFB or RFP, except that it does not apply to (1) ~~contracts~~ contracts with other public agencies; (2) ~~contracts~~ contracts awarded by the City Council or City Manager on a non-competitive basis; or (3) ~~contracts~~ contracts involving a transfer of an interest in real property including, but not limited to, a lease or a ~~contract~~ contract for sale. ; (4) ~~contracts whose award is prescribed by a funding source, such as the state or federal government;~~ (5) ~~contracts for an expenditure less than \$50,000;~~ and (6) ~~consultant agreements for an expenditure less than \$25,000.~~

PROCEDURE FOR PROTEST OF CONTRACT SELECTION:

1. Designation of Bidder as Non-Responsible: When the Evaluation Team has determined that a Bidder is Non-Responsible, the City Manager may elect to pursue debarment if the evidence that supports the Bidder’s designation as Non-Responsible also supports debarment. In the event that the City Manager elects to debar the Bidder, the City Manager shall follow the notice and hearing procedures for debarment set forth in San Diego Municipal Code section 22.0801 *et seq.* In all other cases where the Evaluation Team has determined that a Bidder is Non-Responsible,

~~the City Manager will follow the notice and hearing procedures set forth in this policy.~~

Notice of Intent to Protest: A non-selected *bidder* may protest *award* to the selected *bidder* by submitting a written “Notice of Intent to Protest,” which shall be received by the City Department administering the *contract award*, no later than ten calendar days after the City’s *announcement* of the selected *bidder* or no later than ten calendar days from the date that the City issues notice of designation of a *bidder* as *non-responsible*. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Notice of Intent to Protest on the first work-day following such weekend or holiday. The City shall disclose the method of *announcement* to all *bidders* in the bid documents. Failure to file a timely Notice of Intent to Protest shall bar consideration of a protest.

2. ~~Notice of Designation of Bidder as Non-Responsible: The City shall provide written notice of the City’s designation of a Bidder as Non-Responsible. The notice shall be made pursuant to San Diego Municipal Code section 22.0806. The failure of any Bidder to receive properly served notice shall not affect the validity of the protest. The notice will state the following:~~

- A. ~~— The City’s designation of the Bidder as Non-Responsible;~~
- B. ~~— A summary of the factual basis upon which the Evaluation Team has determined that the Bidder is Non-Responsible; and~~
- C. ~~— That the Bidder will have an opportunity to protest the designation of Non-Responsibility if the Bidder submits a written request for such a hearing within ten calendar days of the date of the notice. If the tenth-calendar day falls on a week-end or City holiday, the protesting bidder may submit the protest on the first work day following such week-end or holiday.~~

Statement of Grounds for Protest: The Notice of Intent to Protest shall state all grounds claimed for the protest and include supporting documentation. Failure to clearly state the grounds for the protest and provide supporting documentation shall be deemed a waiver of all protest rights.

3. ~~Notice of Successful Bidder or Proposer: Following review of all submitted Bids or Proposals, the City shall announce the selected Bidder. The method of public announcement shall be disclosed in the RFB or RFP. All protests of the successful Bidder shall be submitted in writing within ten calendar days from the date of the announcement of the selected Bidder. If the tenth calendar day falls on a week-end or City holiday, the protesting Bidder may submit the protest on the first work day following such week-end or holiday. The written protest shall be submitted to the City department to whom the bids or proposals were submitted.~~

Review of Notice of Intent to Protest: The City Department administering the contract award shall review the Notice of Intent to Protest to determine whether it complies with San Diego Municipal Code section 22.3029(b) and whether the protesting bidder may request a protest hearing under San Diego Municipal Code section 22.3029(d).

- 3a. Grounds for Protest Hearing: A protesting bidder may present evidence at a protest hearing only when the alleged grounds for the protest are as follows: (1) The City failed to follow procedures or requirements specified in the request for bids or request for proposals or equivalent, including any amendments; (2) City employees or evaluation team members engaged in misconduct or impropriety; (3) the City's designation of the protesting bidder as non-responsible was incorrect.
- 3b. No Protest Hearing for Protest of Responsiveness: A protesting bidder shall not be entitled to a protest hearing to protest its own or another bidder's Responsiveness, however, the City Manager may allow a bidder designated as non-Responsive by the City Department to file a Formal Protest, pursuant to the Formal Protest procedures set forth under this Section, if the City Manager determines that a hearing is necessary to resolve a relevant factual issue that cannot be determined from the face of the bid documents.
- 3c. Designation of Bidders as Non-Responsible: When the evaluation team has determined that a bidder is non-responsible, the City Manager may elect to pursue debarment if the evidence that supports the bidder's designation as non-responsible also supports debarment. In the event that the City Manager elects to debar the bidder, the City Manager shall follow the notice and hearing procedures for debarment set forth in San Diego Municipal Code section 22.0801 et seq. In all other cases where the evaluation team has determined that a bidder is non-responsible, the City Manager will follow the notice and hearing procedures set forth in this policy.
- 4. ~~Grounds for Protest: Protests shall clearly state in detail the factual basis for the protest and include all supporting information. Protests shall be limited to the following: (1) The City failed to follow procedures or requirements specified in the RFB or RFP, including any amendments; (2) City employees or Evaluation Team members engaged in misconduct or impropriety; (3) the City's designation of the protesting bidder as non-Responsible was incorrect. A protesting Bidder will not be entitled to a hearing to protest a bidder's Responsiveness, however, the City will allow a Bidder to submit materials concerning its own responsiveness. In the event that the City determines that a Bidder is non-responsive, the City will provide notice to the subject Bidder detailing the factual basis for such determination.~~

Notice of City Determination: After review of a bidder's Notice of Intent to File a Protest, the City Department will provide written notice to the bidder of its determination, detailing the factual basis for the City's determination. Service of the City Department's determination shall be made in accordance with one of the methods listed in San Diego Municipal Code section 11.0301.

5. City Manager Review of Protest: The City Manager will review the protest to determine whether it is timely and satisfies the requirements of Paragraph 4. If the City Manager determines that the protest is either untimely or fails to satisfy the requirements of Paragraph 4, the City Manager will reject the protest and notify the protesting Bidder that no hearing will be held. If the City Manager finds that the protest satisfies the requirements of Paragraph 4, the City Manager will forward the protest to a Protest Hearing Board established pursuant to Paragraph 6 of this policy.

Formal Protest: If the *bidder* desires to continue its protest notwithstanding the City Department's determination, the *bidder* must submit a written Formal Protest, which shall be received by the City Department administering the *contract award* within ten calendar days of service of the City Department's determination. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Formal Protest on the first work day following such weekend or holiday. The Failure to file a timely written Formal Protest shall bar consideration of the Formal Protest.

6. Appointment of Protest Hearing Board: For any Contract except a Consultant agreement, the City Manager shall appoint three individuals to serve on the Protest Hearing Board. These individuals shall be unbiased and may be City employees, but shall not be composed of City personnel who have participated in the subject Bidder selection or are subject to the authority, direction, or discretion of personnel who have participated in the Bidder selection. This standard may be accomplished by excluding division personnel as prospective Board members when that division has rejected the contract that is the subject of a bid protest hearing. The City Manager will designate one member as chairperson. For Consultant agreements, the Board will consist of at least five members. For this five-member Board, the City Manager will appoint two members of the public, including a representative of the Citizens' Equal Opportunity Commission, in addition to the three other members.

Bid Protest Bond: The written Formal Protest shall include a detailed factual response to the City Department's determination, including all supporting documentation. The *bidder* shall also include a bid protest bond in the form of a surety bond from a California licensed surety, an irrevocable standby letter of credit, certified check, cashier's check or money order, made payable to the City of San Diego, in an amount set by ordinance. The bond format shall be in a format acceptable to the *City Manager*. The failure to clearly state the grounds for continuing the Formal Protest, or provide all supporting documentation or the bid bond shall be deemed a waiver of all protest rights.

7. Notice of a Hearing: Upon the appointment of a Protest Hearing Board, the City Manager will set a date, time, and place for the protest hearing. Unless all parties agree to a hearing date with shorter notice, the Board will send written notice to the protesting Bidder not less than five working days before the hearing. The notice will disclose the date, time and place for the protest hearing. If a Bidder protests a

~~determination of Non-Responsibility pursuant to a prequalification procedure, then the hearing will be held prior to closing time for receipt of Bids.~~

City Manager Review of Formal Protest: The City Manager shall appoint a Protest Body and determine whether the grounds stated in the written Formal Protest meet the requirements for a hearing, as set forth in Section 3 of this Policy. The Protest Body will conduct the protest hearing in accordance with the procedure set forth, below. The bidder's failure to comply with Formal Protest procedures set forth in the Policy approved by City Council shall bar further consideration of the bidder's Formal Protest.

- 7a. Protest Body: The City Manager may either appoint a panel to serve as the Protest Body or, alternatively, contract with the State of California Office of Administrative Hearings [OAH] for an Administrative Law Judge [ALJ] to serve as the Protest Body.
- 7b. Purchasing and Public Works Contracts: The City Manager may appoint a three member board to act as the Protest Body, including City management level employees who have not participated in the subject bidder selection or are not subject to the authority, direction, or discretion of personnel who have participated in the bidder selection. This standard may be accomplished by excluding division personnel as prospective members of the Protest Body when that division has rejected the contract that is the subject of a bid protest hearing. The City Manager will designate one member as chairperson.
- 7c. Consultant Agreements: The City Manager may appoint a five member board to act as the Protest Body, consisting of a representative of the Citizens' Equal Opportunity Commission, a representative from the public, and three other members who may be City employees that have not participated in the subject bidder selection or are subject to the authority, direction, or discretion of personnel who have participated in the bidder selection. This standard may be accomplished by excluding division personnel as prospective Board members when that division has rejected the contract that is the subject of a bid protest hearing. The City Manager will designate one member as chairperson.
- 7d. OAH as Protest Body: In the event that a protesting bidder seeks to disqualify a member of the Protest Body on the grounds of bias, prejudice, or interest, the bidder must submit a written request to the City Manager within five calendar days of receiving Notice of a Protest Hearing, stating the factual grounds for disqualification [Disqualification Request]. Based upon the City Manager's evaluation that the Disqualification Request has merit, the City Manager may replace the subject member of the Protest Body or contract with the OAH for an ALJ to serve as the Protest Body. Upon the request of the City Manager, and pursuant to its own internal procedures that are independent from those of the City, the OAH will select an ALJ to act as the Protest Body.

8. Presentation of Evidence: ~~The Board will hear evidence and arguments from the Evaluation Team and Interested Parties, their witnesses or authorized representatives. Evidence may be oral or written, but any documents or written argument must be submitted to the Board no later than three working days prior to the hearing date. Any information or evidence submitted to the Board after the deadline may be excluded by the Board. The Hearing Board need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination. The hearing shall be open to the public.~~

Notice of a Protest Hearing: Upon the appointment of a *Protest Body*, the City Manager will set a date, time, and location of the Protest Hearing. Unless all parties agree to a hearing date with shorter notice, the *Protest Body* will send written notice of the Protest Hearing to the protesting *bidder* not less than five working days before the Protest Hearing. The notice will disclose the names of the members of the *Protest Body* and the date, time and location of the Protest Hearing.

9. Record of Hearing: ~~All hearings shall be tape recorded by the City Manager, however, any Interested Party may request that a certified stenographer record the hearing proceedings in lieu of a tape recording. The requestor of the certified stenographer will bear all recording costs and must provide a complete copy of the hearing transcript to the Board without cost.~~

Presentation of Evidence: The *Protest Body* will hear evidence and arguments from the *evaluation team* and *interested parties*, their witnesses or authorized representatives. Evidence may be oral or written, but any documents or written argument and the names and addresses of witnesses must be submitted to the *Protest Body*, and exchanged between the City Department administering the *contract award* and the protesting *bidder*, no later than three working days prior to the hearing date. Any information or evidence submitted after the deadline may be excluded by the *Protest Body*. The *protest body* need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination. If an ALJ is to act as the *protest body*, however, the City and the *bidder* may consent to follow the hearing adjudication procedure set forth in California Government Code sections 11500 et seq. (also known as the Administrative Procedure Act). The hearing shall be open to the public.

10. Decision: ~~After review of all evidence and arguments presented, the Board will render a final determination by a majority vote. The Board's deliberations and consultation with its legal counsel shall be confidential. The Board will issue its decision on the protest as expeditiously as possible, but no later than thirty calendar days after the protest hearing. The Board will send written notification of the decision to all Interested Parties. Except for protests of Consultant agreements for an expenditure exceeding \$250,000 all Board decisions are final. Board decisions on protests of Consultant agreements for an expenditure exceeding \$250,000 may be appealed to the City Council. This appeal shall be submitted in writing to the City~~

~~department where bids or proposals were submitted no later than ten calendar days after the date the Board issues its decision. The City department will forward the appeal to the City Council. Failure to submit a timely appeal shall bar consideration of an appeal.~~

Record of Hearing: All hearings shall be tape recorded by the *City Manager*, however, any *interested party* may request that a certified stenographer record the hearing proceedings in lieu of a tape recording. The requestor of the certified stenographer will bear all recording costs and must provide a complete copy of the hearing transcript to the *protest body* without cost.

11. ~~Decision Based Upon Evidence: The Hearing Board's decision shall be supported by findings which, in turn, shall be supported by the evidence presented at the hearing.~~

Decision: After review of all evidence and arguments presented, the *protest body* will render a final determination by a majority vote if the *protest body* is comprised of persons other than an ALJ. The *Protest body's* deliberations and consultation with its legal counsel shall be confidential. The *protest body* will issue its decision on the protest as expeditiously as possible, but no later than thirty calendar days after the protest hearing. The *protest body* will send written notification of the decision to all *Interested Parties*. Except for the protest of a *Consultant* agreement for an expenditure exceeding \$250,000, the *protest body* decision is final. A *protest body* decision on a protest of a *Consultant* agreement for an expenditure exceeding \$250,000 may be appealed to the City Council. This appeal shall be submitted in writing to the City department where the bid or proposal was originally submitted no later than ten calendar days after the date the *protest body* issues its decision. The City department will forward the appeal to the City Council. Failure to submit a timely appeal shall bar consideration of an appeal.

12. ~~Burden and Standard of Proof: The protesting Bidder shall bear the burden of proof of the factual basis for the protest by a preponderance of the evidence.~~

Decision Based Upon Evidence: The Hearing Board's decision shall be supported by findings which, in turn, shall be supported by the evidence presented at the hearing.

13. ~~Effects on Contracts: Failure of a City employee or department to comply with this Council Policy shall in no way affect the validity of any Contract entered into between the successful Bidder or Proposer and the City.~~

Burden and Standard of Proof: The protesting *bidder* shall bear the burden of proof of the factual basis for the protest by a preponderance of the evidence.

14. Costs paid by the Bidder: If the *protest body* upholds the determination of the City Department regarding the *award*, the *protest body*, at its discretion, may assess the City's costs of the Formal Protest hearing. The bidder shall then pay the assessed costs within thirty calendar days of service of the decision; otherwise, the City may deduct the assessed costs from the bid protest bond provided by the *bidder*. Any costs

assessed by the *protest body* in excess of the security shall be paid by the *bidder* within thirty calendar days of the *protest body*'s final determination concerning the *award*.

15. Final Decision Date: The decision of the *protest body* shall become final on the date of service of the decision, in accordance with one of the methods listed in Section 11.0301 of the San Diego Municipal Code.
16. Judicial Review of Final Decision: Judicial review of the *protest body*'s decision shall be governed by California Code of Civil Procedure 1094.5 *et seq.*
17. Protest may not Preclude Award or Rejection of Bids: The *bidder*'s filing of a Notice of Intent to File a Protest or written Formal Protest shall not preclude the *City Manager* from rejecting all bids and rebidding a *contract*.